

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD  
CRIMINAL APPEAL No 355 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE R.R.JAIN and

MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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ABDULVAHID ABDULRAHIM PATHAN

Versus

STATE OF GUJARAT

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Appearance:

MR ARUN H MEHTA for Petitioner

PUBLIC PROSECUTOR for Respondent No. 1

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CORAM : MR.JUSTICE R.R.JAIN and

MR.JUSTICE H.R.SHELAT

Date of decision: 07/02/96

ORAL JUDGEMENT(Per: Shelat.J)

This appeal has been directed against the judgment and order dated 27.4.88 passed by the learned Addl.City Sessions Judge, Court no.3 in Sessions Case No. 237/87 on his file convicting the appellants of the offence under section 17 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred

to as the NDPS Act) and sentencing them to suffer R.I. for 15 years and a fine of Rs. 1,50,000/- lacs in default R.I. for 3 years more and also convicting of the offence u/s.66-A of the Bombay Prohibition Act and sentencing to suffer R.I. for 3 years and a fine of Rs.1000/- in default R.I. for 6 months more.

2. The facts in brief leading to the present appeal are that on 3.2.87 Mansinh Devisinh was on duty at Haveli Police Station as PSI. His P.I. was Mr. S.J. Trivedi. The Deputy Police Commissioner, Western Region telephonically informed P.I. Mr. Trivedi that as per the information he had received Abdulvahid Abdulrahim Pathan was staying in Kinariwala Bldg. opposite to Gaekwad Haveli and in that building the appellants were keeping opium without any pass or permit and were selling the same to the customers. After the receipt of the said information P.I. Shri Trivedi called two panchas and appraised them about proposed raid. The house of the appellants was then raided and searched. At that time Abdulvahid and Abdulrahim were present. During the search, from the cellar, opium weighing about 18 kgs. was found. The same was seized. Necessary formalities were undergone and a complaint against Abdulvahid Abdulrahim Pathan, Abdulrashid Abdulrahim Pathan and Abdulrahim Atakhan Pathan came to be filed, which set the investigation into motion. After the investigation was over, charge sheet against the 3 accused was presented before the court of learned Metropolitan Magistrate, Ahmedabad. For want of jurisdiction the case was committed to the City Sessions Court, Ahmedabad for trial. The case came to be registered as Sessions Case No. 237/87 At the conclusion of the trial the then learned Addl. City Sessions Judge, Ahmedabad convicted both the appellants as aforesaid, but acquitted Abdulrahim Atakhan Pathan. As the appellant came to the convicted, they have preferred the present appeal.

3. The learned advocate representing the appellants submitted that the conviction and sentence inflicted were not tenable at law, because the mandatory provision of NDPS Act was set at naught. According to him as per the provisions of section 42 of the NDPS Act, the information as and when received, was required to be reduced into writing and the authority receiving information was bound forward the same within reasonable time to his higher authority. If mandate of this provision was ignored, it would certainly vitiate the proceedings and conviction would have to be set aside. We find great force in the submission made on behalf of the appellant. Similar

question was raised before the Apex Court for consideration in the case of State of Punjab vs. Balbir Singh reported in AIR (1994)(SC) 1872= 1994(3) SCC 299 wherein discussing several provisions and bearing in mind the object of the NDPS Act, it is categorically made clear that the provisions of section 42 of the Act is mandatory and therefore, it is obligatory on the officer receiving information to reduce the same into writing, and if that is not done, it would certainly affect the trial and if at all, the accused is convicted, the conviction will have to be set aside. There is nothing on record indicating compliance of section 42 of the NDPS Act. In this case as the authority receiving information has not taken down in writing the information, he received, the whole proceedings are vitiated and therefore, the conviction and sentence under the NDPS Act cannot be sustained.

4. Even on another count also the appeal will have to be allowed. As per the provisions of sections 41 and 42 of the NDPS Act, the officer empowered or authorised under the Act is competent to carry out the search and seizure. If the officer is not empowered with the powers to carry out the search or seizure, the same would be illegal. It is crystal clear in law that the requirement of law must be strictly adhered to, and if the law casts a duty to do the act through a particular officer, it should be done in the same manner and no other. If the officer not authorised carries out the search or seizure or arrests the person, the same will also vitiate the trial. In this case the house was raided and searched on 3.2.87. At that time the police officers carrying out the raid and search were not authorised. The Notification investing power came to be issued by the Government of Gujarat on 15.6.87. Before issuance of that Notification no other Notification investing the power was in force. When that is the case, it is clear that on the date of the incident, the police officers were not at all vested with the power of seizure, search raid or arrest. Whatever has been done is therefore inconsistent with the mandatory provisions of law, consequently, the proceedings initiated and trial conducted against the appellants are also bad in law. The conviction and sentence being bad in law cannot be sustained. On query the learned A.P.P. Mr. Raval tried his best to satisfy us but he failed to point out anything which would take out his case from the jaws of sec. 41 and 42 of the NDPS Act.

5. In this view of the matter, the appeal will have to be allowed, so far as the conviction and sentence

u/s 17 of the NDPS Act is concerned. So far as the conviction and sentence u/s 66-A of the Bombay Police Act is concerned we do not see any good cause to upset the same being quite in consonance with law, and evidence thereof being sufficient on record. The learned Judge below has very carefully considered the evidence and without any error reached the correct conclusion so far as the same relates to the offence u/s. 66-A of the Bombay Prohibition Act. On query Mr. Mehta the learned advocate for the appellants had no comment to make in view of the overwhelming evidence with regard to the offence u/s/66-A of the Bombay Prohibition Act. The conviction & sentence in that regard will have to be maintained.

6 For the aforesaid reasons the appeal will have to be partly allowed. Accordingly we allow the appeal partly and set aside the conviction and sentence of the offence u/s 17 of the NDPS Act and acquit the appellants thereof. The conviction and sentence u/s.66-A of the Bombay Prohibition Act are maintained; but when the sentence has already been undergone by now, the appellants to be set at liberty forthwith , if no longer required in other matters. Muddamal to be disposed of as per the order of the Lower Court.

for correction pl.see original

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